85-1758

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

REVEREND JOSEPH J. TURNER, S.D.S.,
Petitioner

v.

MR. J.L.G. PARSONS, II,
MEDICAL CENTER DIVISION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Delegation by the Federal Government to the Catholic Church of the Right to Select Federal Chaplains for Veterans Administration Service is Unlawful and in violation of the First Amendment to the United States Constitution.

Whether the District Court Erred in dismissing Petitioner's Motion for Leave to File an Amended Complaint as Moot when the issues contained therein were never made part of the litigation and were never addressed by the parties to the proceeding at the stage of dismissal.

PARTIES TO THE PROCEEDING

Petitioner

Reverend Joseph Turner, S.D.S.

Respondent

Mr. J.L.G. Parsons, II, the Director of the Coatesville Veterans Administration Hospital

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OPINIONS BELOW

The Opinions of the United States Court of Appeals of the Third Circuit is appended hereto at p. A-1 - A-2 and is believed to be unreported. The Opinion of the United States District Court for the Eastern District of Pennsylvania is appended hereto at pp. A-3 through A-14 and is also believed to be unreported.

JURISDICTION

The decision of the Court of Appeals was entered on March 5, 1986. The Jurisdiction of this Court is premised upon 28 U.S.C. §1254.

TEXT OF CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The applicable constitutional provision is the First Amendment to the United States Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The applicable Veterans Administration Regulation is contained in the Manual of the Veterans Administration M-2 Part II, February 23, 1966, which is reproduced in the appendix hereto at pp. A-14 through A-15.

STATEMENT

Petitioner is a natural born American Citizen and a duly ordained Roman Catholic Priest in the Religious Order of the Society of the Divine Savior. On May 9, 1967, Petitioner was endorsed by the Military Ordinate to serve as a Military Chaplain with the United States Army. Petitioner received a temporary commission as a first Lieutenant and on October 3, 1967 he was assigned to serve as a Military Chaplain at the United States Army Training Center at Fort Dix, New Jersey. Upon reporting to training, he was commissioned Captain and thereafter served two tours of duty in Southeast Asia during the Vietnam Conflict. He received an Honorable Discharge from active military service after attaining the rank of Major. At the present time, Petitioner remains under standing Orders to report to duty as a Military Chaplain in the event of full mobilization of the military forces of the United States.

On September 2, 1981, Petitioner applied for Federal employment with the Veterans Administration and sought to fill a vacant Chaplaincy post existing at the

Veterans Administration Hospital located in Coatesville, Pennsylvania. The position was graded GS-11 with a federally-paid salary of $24,000.00 per year. Petitioner was denied the opportunity for employment to that position by the Government.

In attempting to justify its failure to consider Petitioner's application for employment, the Government referred your Petitioner to the Veterans Administration Manual, M-2, Part II of February 23, 1966 (A-14 - A-15) which required that Petitioner have the "endorsement" from the Military Vicariate[1] to serve as a Chaplain in any Veterans Administration facility. Despite the fact that Petitioner was recommended for service as a Veterans Administration Chaplain by the Major Religious Superior of his Religious Order and while he remained endorsed to serve as a Military Chaplain, he was refused an "endorsement" for Veterans Administration Service by the Military Ordinariate and the Government refused to hire your Petitioner. Your Petitioner satisfied all other requirements of the aforementioned regulation.

Your Petitioner commenced this action by the filing of a Complaint on March 20, 1985, alleging that he was denied employment as aforesaid by virtue of discriminatory hiring practices based upon religion and age. On February 21, 1985, Petitioner moved for Leave to Amend the Complaint to allege causes of action for denial of employment based upon violations of the First and Fifth Amendments to the United States Constitution. The Government contested the Motion for Leave to Amend and moved for Summary Judgment upon the original cause of action and the cause of action alleged in the proposed Amended Complaint. Petitioner thereafter filed

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1. The Military Vicariate is the successor to the Military Ordinariate. In essence they are the same body established originally during World War I as a means by which the Catholic Church could maintain centralized communication with the Chaplains in the field of combat.

a Cross-Motion for Summary Judgment upon the allegations of the proposed Amended Complaint. The District Court granted the Government's Motion for Summary Judgment, denied Petitioner's Cross-Motion for Summary Judgment and denied Petitioner's Motion for Leave to Amend as moot.

An Appeal from the judgment of the District Court was taken to the Court of Appeals for the Third Circuit which affirmed the Order and Judgment of the District Court without Opinion.

REASONS FOR GRANTING THE WRIT

1. **This case presents a novel issue. While most challenges to legislation premised upon the establishment clause of the First Amendment relate to governmental interference with matters of religion, this case presents a challenge to legislation which not only permits but condones and fosters church interference with affairs of government.** Under this Court's ruling in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.CT. 2105, 29 L.Ed.2d 745 (1971) such interference by the church violates the clear mandates of the First Amendment. Thus, the decision of the District Court in the instant matter and as affirmed by the Court of Appeals conflicts with this Court's articulation of constitutional standards separating government and religion.

This is not a case involving the decision of any hierarchy within the religious organization with regard to appointment to a religious position as was the case in *Serbian Orthodox Diocese v. Milevojevick*, 426 U.S. 696 (1976). Rather this case involves the appointment of an American cleric to a position of federal employment.

Petitioner in this case is first and foremost an American citizen. He was attempting to secure federal employment with the Veterans Administration. However, because he happened to be a cleric, the selection process which was applicable to his hiring as a federal employee

was not exercised by the Government. Rather, the selection process was delegated by the Government to the church. In essence, by virtue of the regulation governing the selection of Veterans Administration Chaplains, the Government abdicated its responsibility to review Petitioner's qualifications to the church and the Government accepted the decision of the church in refusing to consider your Petitioner for employment. This situation occurred because the Government has not merely utilized the services of the Military Vicariate as a reference vehicle, but rather permitted the Military Vicariate to substitute its decision-making authority for that of the Government.

Simply stated, the church was permitted to exercise a power tantamount to an item veto over selective applicants for federal employment. Thus, through use of such an item veto, the church was authorized to select the employee for hire whom the Government ultimately accepted.

It was just such a veto power which this Court struck down in *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 116 (1982) where a church was permitted a veto over the state's issuance of a liquor license to drinking establishments located within five hundred (500) feet from the church. In *Larkin*, this Court found that the veto power delegated to the church over a traditional governmental function constituted an unlawful delegation of power.

In the instant case, not only is the delegation of governmental power of selection of employees unlawful, but it exists without restraint, and subjects an American cleric to a standard of employment selection different from the selection process governing any other Veterans Administration employee. Thus, while a non-religious Veterans Administration employee may rely upon objective, and reasonable standards for hire, a religious Veterans Administration employee such as your Petitioner, is subjected to the whims and subjectivity of the Military Vicar who relies upon no specific standard or objective

criteria in exercising his power to endorse a Chaplain for service. Hence, the Military Vicar testified at oral deposition as follows:

> "By Mr. Olizi:
> Q. Can you tell us what factors you consider in granting or not granting a VA endorsement?
>
> A. I have no intention of telling you that.
>
> Mr. Moukad: I object to that Question.
> The Witness: It is my business. It has nothing to do with legality. It has to do with the spiritual part of what I have to do."
> (NT Ryan depo, p. 131 4/10/85).

The church candidly admits that its exercise of the endorsement power is limited by nothing more than the conscience of the Military Vicar and it is that same conscience which dictates to the United States Government who it shall or shall not hire as a Chaplain. Pursuant to the current Veterans Administration Regulations as applied by the Government and in conjunction with the church, it makes no difference that a Chaplain candidate possesses all of the objective requirements necessary to discharge the duties and obligation of a Veterans Administration Chaplain. If that Chaplain does not satisfy the personal and spiritual conscience of the Military Vicar, he is considered unsuited for a federal Chaplaincy position of employment by the Government.

Throughout the proceedings below, the Government has maintained that it could not become involved with the inner workings of the church and that it would not interfere with the endorsement process since it was fundamentally a religious process. In that case, it must be determined whether the endorsement process, absent some form of objective standard, may be a requirement for federal employment. Certainly, an American Citizen is no less an American Citizen simply because he dons the robes of a particular ministry. Certainly, he is entitled

to no less than the rights and privileges accorded any other American Citizen and the government should not be permitted to draw a distinction between the classifications and rely upon the First Amendment to shelter it from discharging its duties toward a particular class of Citizens. Such a means of employment is simply arbitrary and capricious. While such unbridled discretion would not be tolerated lawfully with regard to a non-religious employee, the robes of religion permit no justification for tolerating such conduct with regard to a cleric. This Court has noted that neutrality toward religion is the accepted standard. *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952). To apply a limitless standard to clerics constitutes clear hostility toward religious personnel.

In *Larkin v. Grendel's Den, Inc., supra* at 103 S.Ct. 511, this Court commented upon the dangers of delegating boundless governmental authority to a religious body stating:

> "The church's power under the statute is standardless calling for no reasons, findings, or reasoned conclusion. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith."

Similarly, in this case, the church has not exercised its endorsement power to further any legitimate reason. Rather, it was used to punish your Petitioner for advocating, through legitimate political means the adoption by Congress of an Act regulating proportionate faith representation by Chaplains in the military and in the Veterans Administration. Unfortunately, since the Military Vicar maintained contrary political beliefs, he used his

endorsement power to sanction your Petitioner. The Military Vicar on various occasions and in his oral deposition, cited this political dispute as a basis for his denial of an endorsement to your Petitioner. (18a-26a).

The Government has never claimed ignorance of the reason for declination of your Petitioner's endorsement. Rather, it was this very dispute over the aforesaid political issue in which the Government claimed it could not interfere. Nevertheless, and despite the Government knowledge that the church was misusing its power, the Government approved the Church's decision by refusing consider Petitioner for a position for which he was aptly qualified.

As noted previously, your Petitioner satisfied all of the objective requirement necessary for admission to service as a Veterans Administration Chaplain. Moreover, he maintained a current Military Chaplaincy endorsement and he was endorsed for service with the Veterans Administration by his Major Religious Superior. (17a)[2] In light of these circumstances, to require an additional endorsement from the Military Vicar was superfluous. In fact, Petitioner's endorsement from his Major Religious Superior would have been sufficient for employment in other federal positions such as the Federal Prison System which recognizes the endorsement of a Major Religious Superior. (A-27 - A-32) Requiring an additional endorsement from a Military Vicar tends to exalt form over substance for no valid or lawful reason.

2. **The District Court in its opinion ruled that Turner's Motion for Leave to File an Amended Complaint was moot due to the Court's ruling upon the Cross-Motions for Summary Judgment. For the following reasons, the Court erred, since the allegations**

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2. It should be noted that Religious Orders maintain hierarchy separate but equal to that of secular priests. Thus, a Major Religious Superior is equal in status in the Catholic Church to a Secular Bishop. In this case, the military Vicar, Joseph Ryan, was a Secular Bishop.

of the proposed Amended Complaint were not rendered moot by the Court's decision.

This case as originally filed was based upon a theory of age and religious discrimination. As a result of information gathered through discovery and Counsel's independent investigation, it was determined that Petitioner's action should have been based upon the following theories of liability:

1) First Amendment violation of the Establishment Clause due to unlawful delegation of federal authority to a church,

2) First and Fifth Amendment violation for actions of the Government and the Military Vicariate in conspiring to deprive Petitioner of his First Amendment rights of free speech and right to petition the Government.

On February 21, 1985, Petitioner filed a Motion for Leave to File Amended Complaint embodying the theories of liability noted above. Furthermore, Petitioner sought to join as defendants the Military Vicariate and Archbishop Joseph Ryan, the military Vicar. In opposition to Petitioner's motion, the Government filed a Motion for Summary Judgment in which it contended that Petitioner had not been able to produce any evidence to support his claims under the original complaint (age and religious discrimination). The Government also argued that Petitioner's claim based upon an unlawful delegation of federal authority to the church involved an internal dispute within the church over which the District Court had no jurisdiction. The Government however, did not address the issue of conspiring to violate Petitioner's First and Fifth Amendment rights. Thus, the grant of the Government's Motion for Summary Judgment if granted could not affect Petitioner's alternate theory of recovery.

On the other hand however, and due to the evidence on record, Petitioner had elicited enough evidence to

warrant a Cross-Motion for Summary Judgment on the basis of the delegation issue since the facts were not in dispute. Thus on March 20, 1985, Petitioner filed a Cross-Motion for Summary Judgment on the delegation issue only. If that motion were granted, it would have been dispositive of the case.[3]

In its opinion of May 30, 1985, the District Court granted the Government's Motion for Summary Judgment and denied Petitioner's Cross-Motion. Since both Motions were only based upon the delegation issue, the Court's opinion addressed only that issue. Thus, the conspiracy issue, having been presented in the proposed Amended Complaint remained a viable issue for trail or further Motions after completion of discovery. Hence, the proposed Amended Complaint was not moot.

The remaining claim was a meritorious one which had been flushed out by the testimony obtained in Archbishop Ryan's deposition. As noted previously in this brief, one of the reasons asserted by Ryan to justify his failure to endorse Petitioner for the vacant chaplaincy position was Petitioner's constant advocacy through legislative channels of a proportionality bill for military and Veterans Administration Chaplains. Petitioner's free speech and lobbying efforts annoyed Ryan to the point where he used his federally-delegated position as endorsing agent and power of endorsement to punish Petitioner to keep him from voicing an opinion contrary to that of the Archbishop and to put an end to Petitioner's lobbying efforts. Thus, Ryan's conduct, using authority of the federal government and the support of the Government (which would not employ Petitioner without an endorsement) acted to deprive Petitioner of his First Amendment

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3. In order to properly frame any attack on the conspiracy issue, the depositions of Archbishop Ryan and Monsignor Markham were needed. Those depositions were not taken until April 10, 1985.

right of free speech and association. Thus, Petitioner's Motion for Leave to File an Amended Complaint is not rendered moot.

CONCLUSION

For all of the foregoing reasons, this Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

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Date: April 25, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1350

TURNER, S.D.S., REV. JOSEPH J.

v.

PARSONS, II, MR. J.L.G.
MEDICAL CENTER DIRECTOR

Reverend Joseph Turner,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 84-1340)
District Judge: Honorable James McGirr Kelly

Submitted under Third Circuit Rule 12(b)
Monday, February 10, 1986

BEFORE: HUNTER and GARTH, *Circuit Judges*
and FISHER, *Chief District Judge*[*]

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

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[*]Honorable Clarkson S. Fisher, United States Chief District Judge of the District of New Jersey, sitting by designation.

By the Court,

_____

Circuit Judge

ATTEST:

_____

Sally Mrvos, Clerk

DATED: March 5, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REVEREND JOSEPH TURNER	:	CIVIL ACTION
	:	
v.	:	
	:	
MR. J.L.G. PARSONS,	:	
MEDICAL CENTER DIRECTOR	:	NO. 84-1340

MEMORANDUM AND ORDER

KELLY, J. MAY 30, 1985

Presently before this court are cross motions for summary judgment filed by defendant J.L.G. Parsons, Medical Center Director, Veterans Administration Hospital, and plaintiff, Reverend Joseph Turner. Further, plaintiff has made a separate motion to amend his complaint.

Plaintiff, in his original complaint, alleges that he was denied employment by the Veterans Hospital, an agency of the executive department of the United States. Plaintiff has applied for a position as chaplain in the hospital. Plaintiff, a Catholic priest, had the endorsement of his superior within his particular religious society within the Catholic Church. However, plaintiff asserts that he was denied consideration because the Military Vicariate, a central agency of the Catholic Church, did not grant its endorsement. This endorsement is required by Veterans Administration regulations. Furthermore, plaintiff alleges that he was denied consideration because of his age, being 53 at the time of his application. Therefore, plaintiff's claims are that he was denied employment because of his religious faith and his age.

Plaintiff claims that other candidates for a chaplaincy in other denominations are required only to secure the endorsement of their immediate superior, while the

Catholic Church requires approval by the Military Vicariate. To remedy those alleged wrongs, plaintiff prays for relief in the form of an injunction against the Veterans Administration from discriminating between religious endorsements, to provide equal opportunity to Catholic chaplains, and to provide backpay to plaintiff.

Plaintiff now seeks to amend his complaint, bringing in new defendants. The new defendants would be Harry Walters, the Administrator of the Veterans Administration, the Military Vicariate, a religious corporation organized under the laws of the State of New York, and Archbishop Joseph Ryan, president of the Military Vicariate. The allegations in the proposed amended complaint, while generally the same as the original complaint, are framed to also shed light on purported wrongs committed by the Military Viacariate. Plaintiff contends that the Military Vicariate wrongfully interfered in the hiring practice of the United States Government.

Once a responsive pleading is served, a party must seek leave of court to amend his pleading; leave should be freely given. Fed. R. Civ. P. 15. However, leave need not be given where the amended pleading may be defeated by a motion to dismiss or a motion for summary judgment. *Collyard v. Washington Capitals*, 477 F. Supp. 1247, 1249 (D. Minn. 1979); *Bernstein v. National Liberty International Corp.*, 407 F. Supp. 709, 714-715 (E.D. Pa. 1976). Because of this, I will first address defendant's motion for summary judgment.

Defendant asserts that plaintiff was not eligible for consideration since he failed to meet the minimum qualifications required by the Veterans Administration for a chaplain's position. The Manual of the Veterans Administration (Manual), M-2 Part II (February 23, 1966),

defendant's Exhibit A,[1] sets forth the criteria for employment. Specifically, Section 1.06 of the Manual states in pertinent part:

> 1.06 SELECTION AND APPOINTMENT
>
> a. To be eligible for appointment as a chaplain in the VA, a clergyman must meet certain basic minimum qualifications (see app. 17A, DM&S Supp., MP-5, pt. I):
>
> (1) Must be a citizen of the United States;
>
> (2) Must be an ordained clergyman;
>
> (3) Must have the bachelor of arts plus the bachelor of divinity degrees or bachelor of sacred theology (or their equivalents in terms of semester hours of undergraduate and graduate study), from an accredited college, university or theological institution;
>
> (4) Must have had at least 3 years of experience after ordination, in which the principal duty was as a clergyman after completion of his professional preparation; and,
>
> (5) *Must have an ecclesiastical endorsement from the officially recognized endorsing body of his denomination.* The endorsement, which the applicant must furnish the VA, is the written statement that the applicant's denomination certifies to his good standing as a regularly ordained clergyman of the denomination for the 12-month period prior to the endorsement.
>
> (6) It also certifies that the individual so endorsed is, in the judgment of the endorsing

1. The Veterans Administration, through its staff attorney has submitted a declaration under penalty of perjury that defendants' Exhibit A contains the Veterans Administration Chaplaincy Services Administration Programs.

> body, qualified to represent the denomination in this specialized ministry.

(emphasis added).

Furthermore, the defendant has submitted an affidavit of Simeon Kobrinetz, the Director of Chaplain Service, Veterans Administration Central office, who avers that for the appointment of Catholic priests the official endorsing agency is the Military Vicariate. It is further averred that Reverend Joseph J. Turner, plaintiff in this action, has been refused such endorsement from the Military Vicariate.

Defendant has submitted for my consideration, a document titled "Vademecum" which is published by the Military Vicariate. This document recites the authority within the Catholic Church, the Military Vicariate has over priests who desire to be or are chaplains. Specifically, it states in part, "[a]ccording to the decree of erection of the Military Vicariate of the United States of America, dated September 8, 1957, the following are subjects of the Military Vicar: . . . 2) Priests who are chaplains of hospitals commonly called 'Veterans administration Medical Centers and Domiciliaries.' " (Vademecum at 25).

Further, it is stated by the Military Vicariate:

> 1) to function as a chaplain in . . . the Armed Forces or Veterans Administration, a priest must have the endorsement of the Military Vicar . . . This means that for each of the following sets of circumstances, a priest must request endorsement by the Military Vicariate: . . .
>
> b. to enter upon . . . V.A. or other duty, even though already endorsed for inactive duty.

Vademecum at 23.

Because plaintiff has failed to secure the endorsement of the Military Vicariate, he fails to meet the employment criteria set out by the Veterans Administration for a chaplaincy position. However, it is this very requirement of Military Vicariate approval which plaintiff asserts violates the Establishment Clause of the first amendment.

Plaintiff contends the government's requirement of prior church approval of chaplaincy candidates permits excessive entanglement between church and state relations, thus in violation of the United States Supreme Court's holding in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Indeed, the Court in *Lemon* did hold that a statute, so as not to offend the Establishment Clause, must pass a three prong test which is: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-613 (citation omitted).

The Court's analysis in *Lemon* has been tempered by subsequent opinions of the Court. In *Lynch v. Donnelly*, ____U.S. ____, 104 S.Ct. 1355, *reh'g denied*, ____U.S. ____, 104 S.Ct. 2376 (1984), the Court stated:

> In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.

Id. at 1358-59.

> In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses in not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment

> Clause 'was to state an objective, not to write a statute.' *Walz, supra*, at 668, 25 L.Ed 2d 697, 90 S.Ct. 1409. The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in as single stroke or phrase or test. The Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' *Lemon, supra*, at 614, 29 L.Ed 2d 745, 91 S.Ct. 2105.
>
> In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon, supra*. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.

Id. at 1361-62 (remaining citations omitted).

Plaintiff further asserts that the United States Supreme Court's holding in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) should be controlling in the instant matter. In *Larkin* the Court held invalid a Massachusetts statute which allowed *inter alia* a church[2] to object to the granting of a liquor license to any establishment within 500 feet of the church. If the church objected, the license could not issue. The Court interpreted the statute as giving a veto over the issuance of a liquor license, and therefore an impermissible delegation of legislative

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3. 2. Section 16C of chapter 138 of the Massachusetts General Laws defines a church as follows: "a church or synagogue building dedicated to divine worship and in regular use for that purpose, but not a chapel occupying a minor portion of a building primarily devoted to other uses." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117, n.1 (1982).

power to religious organizations. Although the Court acknowledged certain permissible incidental entanglement between church and state, it found that there was a substantial breach between the separation of church and state. *Id.* at 123.

I find the *Larkin* case distinguishable from the matter now before me. The armed forces provide chaplains to accommodate its members' right to freedom of religion which is found in the first amendment Free Exercise Clause. *A fortiori* there are many instances where the Free Exercise Clause and the Establishment Clause will be in tension. *Lynch v. Donnelly, supra.* Therefore, the Free Exercise Clause and Establishment clause must be examined in tandem. The Second Circuit Court of Appeals recently held in *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) that:

> The second provision of the Constitution which plays a vital role in our interpretation of the Establishment Clause is the Free Exercise Clause of the same Amendment. It is readily apparent that this Clause, like the Establishment Clause, obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them. Otherwise the effect of compulsory military service could be to violate their rights under both Religion Clauses of the First Amendment. Unless the Army provided a chaplaincy it would deprive the soldier of his rights under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion.

Id. at 234.[3]

---

3. The other provision the Second Circuit relied upon to uphold the constitutionality of the Army hiring chaplains is Congress' war powers.

I find the logic of the Second Circuit sound. However, the fact that the Armed Forces may have a duty to hire chaplains, does not give it the power to determine which individuals can or may represent the various religious denominations. It is this entanglement which the Court in *Lemon, supra*, sought to guard against. The Court in *Larkin, supra*, prohibited the church from having a veto over the issuance of liquor licenses. The issuance of a liquor license is secular. In the matter before me, there is a requirement that a church endorse a person who will represent the church to servicemen and servicewomen. These people who seek the endorsement of the church (in effect, church approval is a condition precedent to being qualified to take a position of a Catholic chaplain) will not provide a service which is secular in nature; rather their function is primarily religious, namely, occupying the position of chaplain.

Thus, the distinction between the matter now before me and the matter before the *Larkin's* Court is that here the church seeks to control factors which control its religious destiny and those who may represent it, while in *Larkin's* the Court refused to allow a church to control matters which are primarily secular.

For this court to decide who may or may not represent a certain religion would be for this court to go to the heart of religious organizations and their beliefs and impermissibly interfere in their operations. I cannot conceive of any greater interference or entanglement a government could launch than to dictate who may or may not represent a religious faith to its flock. Moreover, if this were to be done, it would change or interfere with the expectations the followers of a certain religious faith may have, as the government would be the party which would determine who will lead the flock.

I turn to plaintiff's allegation that he was denied consideration for a chaplain's position because of his age, which was 53 at the time of his application. Plaintiff's allegation lacks substance because he has not met the

criteria for employment by obtaining the endorsement of the Military Vicariate. Furthermore, plaintiff has not established or even alleged that the requirement of having the endorsement of the Military Vicariate is a pretext for impermissible age discrimination.

In conclusion, plaintiff has complained that the Veterans Administration has violated the Establishment Clause by requiring the Military Vicariate to endorse applicants for a position as a Catholic chaplain within the Veterans Administration. I hold, as a matter of law, that for the government to determine who is qualified from the various religious faiths to lead the flock of Catholicism would be for the government to impermissibly interfere or entangle itself in religion. The fact that the government must rely upon the various religious institutions for their consent or advice before hiring a person as a chaplain is one situation where absolute separation between church and state is not possible. *Lynch v. Donnelly*, ____ U.S. ____, 104 S.Ct. 1355, 1358-1359 (1984); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

Accordingly, plaintiff's motion for summary judgment will be denied and defendant's motion for summary judgment will be granted. Plaintiff's motion for leave to amend will be dismissed as moot. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REVEREND JOSEPH TURNER	:	CIVIL ACTION
	:	
v.	:	
	:	
MR. J.L.G. PARSONS,	:	
MEDICAL CENTER DIRECTOR	:	NO. 84-1340

ORDER

AND NOW, this 30th day of May, 1985, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. Plaintiff's motion for summary judgment is DENIED.

2. Defendant's motion for summary judgment is GRANTED.

3. Plaintiff's complaint is DISMISSED with prejudice.

4. Plaintiff's motion for leave to amend is DISMISSED AS MOOT.

BY THE COURT:

_____

JAMES McGIRR KELLY, J.

b. Explanatory statements regarding the staffing guide by column number are given below:

(1) The total number of patients for a given major faith group.

(2) The scheduled hours of duty required per week based upon patient load.

(3) The scheduled duty hours needed when the regular chaplain is not on duty because of days off. The hospital should have coverage 7 days a week with this patient load.

(4) The total annual hours based on weekly schedules of columns (2) and (3).

(5) The total annual hours based on weekly schedules of columns (2) and (3).

(6) No specific number of hours have been suggested because the situation may vary from station to station. However, it is expected that the station will provide the necessary intermittent time for the coverage of the religious needs in the absence of the regularly scheduled chaplains. While it is not expected that complete religious coverage will be provided there should be provision for:

(a) Scheduled weekly religious services;

(b) Pastoral calls to critically or seriously ill patients, as required;

(c) Pastoral calls to newly admitted patients and to those facing major surgery.

c. There are instances under usual employment procedures when it is not possible to employ a clergyman to serve the specific religious needs of veterans in a hospital. (Examples include long distances to travel,

noncitizen status of the clergyman, inability of one clergyman to assume the total responsibility, etc.) It is possible under these circumstances to secure the needed religious ministry by a contract with a clergyman, either an an individual, head of a parish or a member of a "religious house." In these instances, the field station head will forward an SF 57 for the clergyman under consideration and a proposed contract to the Director, Chaplain Service, for review and prior approval. (Contract format may be secured from Director, Supply Service (134C), Central Office.) The clergyman will submit the ecclesiastical endorsement to the Director, Chaplain Service, "Veterans Administration, Washington, D.C. 20420. (Ref. VAPR 8-3.204)

1.06 SELECTION AND APPOINTMENT

a. To be eligible for appointment as a chaplain in the VA, a clergyman must meet certain basic minimum qualifications (see app. 17A, DM&S Supp., MP-5, pt.I):

(1) Must be a citizen of the United States;

(2) Must be an ordained clergyman;

(3) Must have the bachelor of arts plus the bachelor of divinity degrees or bachelor of sacred theology (or their equivalents in terms of semester hours of undergraduate and graduate study), from an accredited college, university or theological institution;

(4) Must have had at least 3 years of experience after ordination, in which the principal duty was as a clergyman after completion of his professional preparation; and,

(5) Must have an ecclesiastical endorsement from the officially recognized endorsing body of his denomination. The endorsement, which the applicant must furnish the VA, is the written statement

that the applicant's denomination certifies to his good standing as a regularly ordained clergyman of the denomination for the 12-month period prior to the endorsement.

(6) It also certifies that the individual so endorsed is, in the judgment of the endorsing body, qualified to represent the denomination in this specialized ministry.

b. Once assigned and on duty in the VA, the ecclesiastical endorsement must be renewed annually. This annual renewal of endorsement will be requested by the Chaplain Service, Central Office, and no action to secure such reendorsement is necessary on the part of assigned chaplains. Withdrawal or nonrenewal of ecclesiastical endorsement will be sufficient cause for initiating separation action.

c. In the selection of applicants to be appointed to chaplain positions in the VA, due consideration is given to whatever additional training or experience the applicant may have had which would equip him for work in a VA hospital and would enhance the prospect of an effective ministry.

d. All appointments to the Chaplain Service are "centralized," i.e., selection is made in Central Office and appointment authority issued to the employing station, except appointments for periods up to 1 month. (See DM&S supp., MP-5, pt. I.)

e. An appointment of a chaplain to a specific hospital is for an indefinite period of time. This is not, however, to preclude the reassignment of chaplains from one hospital to another by the Director, Chaplain Service. Reassignments may be made with or without the consent of the chaplain and are based upon the needs and for the good of the VA.

1.07 TRAINING AND EDUCATION OF CHAPLAINS

a. Initial training for newly appointed chaplains and advanced training for VA chaplains is described in DM&S Manual M-3, part II, chapter 4.

b. Workshops and seminars and other educational programs for the professional training of VA chaplains are also described in M-3, part II, chapter 4.

c. Chaplains will be expected to pursue continued personal study and self-improvement in the field of the hospital chaplain. Where possible, they will attend professional meetings and seminars designed to improve their effectiveness as chaplains.

September 29, 1982

His Eminence Terence Cardinal Cooke, Military Vicar
Chancery of Military Vicariate
1011 First Avenue
New York, New York 10022

Your Eminence:

The purpose of the letter is two-fold. First, I would like to introduce myself as the new Director of Personnel for the North American Province of the Society of the Divine Savior. There was a change of administration on June 1 of this year.

Second, I would like to renew the endorsement of the previous Provincial Board of Fr. Joseph Turner, SDS, as a member in good standing of the Society of the Divine Savior. As you are aware, Fr. Turner was not granted the endorsement of the Military Vicariate for the position as chaplain at the Veterans Hospital at Coatesville, Pennsylvania (communicated in a letter to my predecessor, Fr. Brendan Flanagan, from Msgr. James Markham on September 10, 1981).

I am respectfully asking if it is still the judgment of the Military Vicariate that Fr. Turner should not be granted its endorsement.

Thank you for your help in this matter.

I have the honor to be, Your Eminence,

Respectfully in the Savior,

Rev. Dennis Thiessen, SDS
Director of Personnel

cc: Fr. Joseph Turner, SDS

January 27, 1984

The Honorable Thomas N. Foglietta
William J. Green Bldg.
Sixth & Arch Streets
Room 10402
Philadelphia, PA 19106

Attention: Mr. Hudak

Pursuant to Monsignor Markham's conversation with you this morning I write to confirm the following information:

1. The Catholic Church has appointed the Military Vicar, United States of America, to take charge of the Catholic priests who became chaplains in the Armed Services and the Veterans Administration.

2. Both the late Vicar (Cardinal Cooke) and Archbishop Ryan, acting Military Vicar, have carefully investigated the allegation that there has been any prejudice or unfair treatment in the termination of Catholic chaplains. They are satisfied that such allegations are without basis.

3. Father Turner will not be granted an endorsement by the Military Vicar for any future work as a chaplain.

I trust that this information will be helpful to you and Congressman Foglietta.

Sincerely yours in Christ,

†Joseph T. Ryan
Archbishop

January 25, 1984

Archbishop Joseph T. Ryan
Military Vicariate
1011 First Avenue
New York, New York 10022

Dear Archbishop Ryan:

I wish to thank you for your kind assistance to me concerning the status of the Reverend Joseph Turner, S.D.S. I found our conversation to be most helpful and I appreciate the time and help you've given me.

Enclosed for your reference are samplings of the kind of correspondence we have been receiving through Father Turner's "crusade"! I hope these letters are self-explanatory.

If our office can ever be of help to you, please don't hesitate to call.

With best wishes from Congressman Foglietta, I am,
Sincerely,

Robert A. Hudak
Staff Assistant

PS The name of the wonderful priest in Alaska who is a dear friend of my sister-in-law is Jesuit Father Tom Gallagher!

enclosure

June 13, 1984

Mr. Albert Olizi
530 Walnut Street
12th Floor
Philadelphia, Pennsylvania 19106

Dear Mr. Olizi:

In accordance with our telephone conversation this morning I am pleased to send you the following enclosures:

1. A copy of my letter to Msgr. Hessian under date of March 1, 1984. This letter does not specifically mention Father Turner by name, but it is because of him that the letter was written. Although it mentions military services, it includes Veterans Administration chaplains. Priests who wish to serve as chaplains in Veterans Administration hospitals must be endorsed by the Military Vicariate.

2. Copies of three letters and two memos relative to Father Turner:

a. A letter from Senator Strom Thurmond to Father Turner under date of April 11;

b. A letter from Chaplain Alan Plishker to Bishop Dimino.

You will note that Senator Thurmond used some of the information given in my letter to Monsignor Hessian.

I hope these enclosures will assist you in making a decision as to what you should do relative to Father Turner's request.

If I can be of any further help, please be in touch with me.

Sincerely yours in Christ,

†Joseph T. Ryan
Coadjutor Archbishop

JTR:cs

March 1, 1984

Chaplain (Maj. Gen.) Patrick J. Hessian
President
Armed Forces Chaplains Board
Office of Assistant Secretary of Defense (MRL)
Room 3E752, The Pentagon
Washington, DC 20301

Dear Chaplain Hessian:

It has been brought to our attention that for the past few years the President, members of Congress and other public and private officials have received numerous inquiries concerning the shortages of Roman Catholic priests in the military chaplaincies. Frequently these inquiries attribute the shortage of Catholic priests to current personnel policies as practiced by the military departments. The Military Vicariate, as the official endorsing agency for all Roman Catholic priests serving in the military services, recognizes that the shortage of priests now being experienced in the armed forces is not the result of any personnel management policies as practiced now or in the past by the military.

The shortage of priests in the military is the same shortage now being experienced in dioceses and religious communities throughout the United States. Any contention that the shortage of Catholic chaplains is the result of exclusionary procurement goals, of an up-or-out promotion policy, the involuntary separation of priests or any other personnel policies is simply unfounded. It is well documented that the few involuntary separations of Roman Catholic clergy occurring over the past few years are by no means responsible for the current priest shortage. In order to provide quality religious programs, we recognize the military's need to manage their chaplain personnel and their right to separate any chaplain whose level of performance falls below that of fully qualified.

We therefore endorse those personnel policies of the military departments that are designed to provide the highest quality of religious services that members of the armed forces deserve and are their right under the Constitution.

We are deeply grateful for your concern for the pastoral care of Catholics and other religious denominations experiencing shortages of military chaplains in the armed forces. We pledge our renewed efforts to work with the armed forces to recruit qualified clergy to serve Catholic military personnel.

Sincerely yours in Christ,

+Joseph T. Ryan
Coadjutor Archbishop

JTR:cs

April 19, 1984

The Most Reverend Joseph T. Dimino
Vicar General
Office of the Military Vicariate
1011 First Avenue
New York, New York 10022

Your Excellency:

The attached letter from Senator Strom Thurmond was sent in response to Reverend Joseph Turner's request for support of legislation that would address the shortage of Roman Catholic priests and rabbis in the military chaplaincies. To the best of my knowledge, it is the first time a member of Congress has gone on record and said NO to Father Turner. The Military Vicar's letter to Chaplain Hessian supporting the personnel policies as practiced by the military was decisive in Senator Thurmond's strong response to Father Turner.

The Armed Forces Chaplains Board is most appreciative of the Military Vicar's support. We will put Senator Thurmond's letter to good use.

Sincerely,

R. ALAN PLISHKER
CAPTAIN, CHC, USN
Executive Director

Attachment
a/s

April 11, 1984

Reverend Joseph J. Turner
Co-Chairman, Chaplain Research Committee
26 Vernon Road
Havertown, Pennsylvania 19083

Dear Reverend Turner:

This is a follow up to your visit to my office to express your concern over a faith imbalance in the military chaplaincies. In examining this issue again, I learned that the Chiefs of Chaplains, Military Departments, the Office of the Military Vicariate and the Commission on Jewish Chaplaincy, have investigated this issue in great detail numerous times.

In review of this issue and available facts from DOD studies, I find that you are correct and the Services acknowledge that there does exist a shortage of Roman Catholic priests and rabbis in the military chaplaincies. However, this shortage is directly related to shortages existing in the civilian sector. Nationwide, there has been a sharp decline in the number of young men entering the priesthood and of rabbis entering the pulpit ministry. This has been well documented by numerous studies and confirmed by the Office of the Military Vicariate and the Commission on Jewish Chaplaincy.

Factual data reveals that the shortage of priests and rabbis is not due to current legislation or personnel policies as practiced by the military departments. Any contention that the shortage of priests and rabbis in the military is the result of exclusionary procurement goals, of an up-or-out promotion policy, the involuntary separation of chaplains or other personnel policies cannot be substantiated. A review of the facts reveal that during the past five years (1979-1983) four priests who were Reserve officers were released to inactive duty after two failures to be selected for promotion. No rabbis were released during this period. Also, under current statute

the military services may, based upon their needs, continue a chaplain who has twice failed selection.

As you probably know, the Office of the Military Vicariate, the Commission on Jewish Chaplaincy and I support the military's need to manage their chaplain personnel. We all support and endorse the current military personnel policies that are designed to provide the highest quality of religious services to members of the Armed Forces.

Second, the solution to the current shortage of priests and rabbis cannot be solved by extending on active duty chaplains who have reached the mandatory retirement age. The Services' need is for younger not older clerics. Military chaplains must be able to perform their duties in the same rigorous environment as the men and women they serve, many of whom are in their late teens and early twenties. Age, physical conditioning, and stamina are important factors for manning the military chaplaincies.

Third, the Services use, on a voluntary basis and when available, Reserve chaplains to alleviate the current shortage. However, under present statute, authority to involuntarily activate a Reserve member or unit rests with the President and Congress, in response to a national emergency. Any involuntary recall of priests or rabbis would only aggravate shortages in the civilian sector and seriously impact upon the Services' ability to recruit young priests and rabbis.

Fourth, in cooperation with the Military Vicariate and the Commission on Jewish Chaplaincy, the military services are involved in an active recruiting program. The Defense Department has informed me that on February 16, representatives of the Army, Navy and Air Force met with Bishop Roque of the Office of Military Vicariate to expand the recruitment effort of priests for the Armed Forces.

Fifth, according to reports I have received, there are no numerical limitations which are impacting upon the

appointment of priests and rabbis to the Armed Forces. The military services will gladly appoint qualified priests and rabbis, if they are available.

I believe that through careful attention and management the military departments are meeting the religious needs of service personnel. I am confident that the military departments are taking every step to ensure that men and women of the Armed Forces receive the highest quality of ministry which is their right under the Constitution.

In view of this report I have received from the Defense Department, it does not appear that legislation would serve any useful purpose in resolving the imbalance. The Senate Armed Services Committee will continue to monitor the religious program in the Armed Forces.

With kindest regards and best wishes,

Sincerely,

Strom Thurmond

ST:uj

A CAREER WITH THE FEDERAL PRISON SYSTEM
CORRECTIONAL OFFICER, GS-007-06
$15,000 to $16,000

In order to help inmates function successfully on their return to the outside community, the Federal Prison System has developed a number of innovative and intensive correctional programs. The largest group of line staff who have the most direct day-to-day contact with inmates is Correctional Officers.

THEIR DUTIES INCLUDE:

Enforcing the rules and regulations governing the operation of a correctional institution and the confinement, safety, health and protection of inmates.

Supervising the various work assignments of inmates.

Participating as a member of the corrections team of case workers, psychiatrists, psychologists, teachers, and others working to help the individual inmate.

BASIC REQUIREMENTS

To become a Correctional Officer, you must show that you have had a minimum of 3½ years of general experience. This experience must have been in one or more of the following or similar types of work:

—Supervisory or leadership experience.

—Teaching or instructing, especially with adults or disadvantaged groups.

—Enforcement of rules and regulation relating to safety, health or protection.

—Corrections or rehabilitation.

—Counseling in a welfare or other social science agency.

—Interviewing or counseling.

—Sales work which involves extensive person-to-person relationships.

SUBSTITUTION OF EDUCATION FOR EXPERIENCE

Education successfully completed in an accredited college, university or resident school above the high school level may be substituted as indicated below:

1) Two (2) years of study successfully completed in a resident school above the high school level may be substituted for two (2) years of general experience.

2) Successful completion of a full four year course of college study may be substituted for three (3) years of general experience.

3) One (1) full semester of graduate study in correctional administration, criminology, penology, sociology or social work successfully completed at an accredited college or university may be substituted for six (6) months of general experience, and is fully qualifying for GS-6 level.

ADVANCEMENT

After one year of satisfactory service, a Correctional Officer may be advanced to the next higher grade level. Advancement beyond that depends upon available vacancies, personal performance, and demonstrated ability. Opportunities for training and education are available both during and after duty hours.

A strong merit promotion system allows advancement to correctional treatment specialist, teacher, and other positions.

FEDERAL CORRECTIONAL INSTITUTION
OTISVILLE, NEW YORK

Position Description

CHAPLAIN

I. INTRODUCTION

Incumbent is a staff officer who functions at department head level, and is responsible for chaplaincy activities of the Religious Department in a federal correctional institution in the U.S Bureau of Prisons and a population of approximatley 450-500 male inmates. Under the general direction of the Associate Warden (P), he is responsible for the organization, supervision, administration, and execution of the activities of the religious department. His duties are determined and influenced by a conscientious adherence to the basic principles of a full priestly and sacramental ministry and inculcation and development within the inmate of the moral and ethical principles of religion necessary for self rehabilitation. The position is located at the Federal Correctional Institution, Otisville, New York.

II. MAJOR DUTIES AND RESPONSIBILITIES

Incumbent provides a full sacramental ministry to the Protestant inmate body which includes opportunities for public and private worship on Sundays and such other days as appropriate within the Church year and the administration of the rites and sacraments of the Church.

Supervises all religious contract personnel and clergy volunteers as well as religious lay workers. Also supervises either Correctional Department staff and/or other institution staff (depending on the program) in the areas of: Group activities within the department; i.e. bible study, group counseling, choir practice; formal religious services — Catholic, Protestant, Jewish, Muslim,

and others; choir trips into the community; and Religious Department sponsored special programs such as dances, lectures, plays, etc., in the institution or in the community. Incumbent reports performance evaluations on staff supervised to responsible department head.

Responsible for the preparation and administration of a budget adequate to the fulfillment of the needs and requirements of the Religious Department.

Scrutinizes materials entering the institution. Selects appropriate materials for the religious library.

Provides a full supportive pastoral ministry of visitation throughout the institution which encourages individual and group counseling with the view of solving problems in adjustment to confinement, family, community; as well as providing insights into those feelings which motivate human behavior.

Evaluates religious background and development of inmates and maintains adequate records on these individuals as well as his work with them during their incarceration.

Works with appropriate personnel in the unit teams to better facilitate referrals for pastoral emergencies such as deaths, hospitalizations, family crises, etc.

Works with administration to establish better liaison with various departments involved in the care of inmates.

Continues to plan and coordinate total religious program in light of new developments in the Criminal Justice System and penology in general.

Works in providing opportunities for religious experience of non-protestant and non-catholic inmate population. Assists the inmates in developing realistic goals in the moral and ethical areas. Provides fitting reports to other staff members and agencies when they are requested.

Maintains close ties with his denomination, maintaining current ecclesiastical endorsement. Attends professional conferences and meetings of his denomination and of the Bureau of Prisons.

Assists in interpreting institution and Bureau of Prisons policies, procedures, philosophy, and program to the public. Furthers community interest in inmate problems by contacting local clergymen, organizations, and families.

Provides indoctrination/orientation of new chaplains and correctional staff upon request of the Director of the Bureau of Prisons or his representative.

III. JOB CONTROLS

Ecclesiastical control of the Chaplain remains with his own church. Professional guidance is provided through consultations and program surveys by the Regional Supervising Chaplain, Bureau of Prisons. The Associate Warden (P) provides general supervision on administrative aspects of his work.

IV. OTHER

Incumbent is required to be a graduate of both an approved college and theological seminary; to have the unqualified endorsement of his denomination and an adequate period of ministerial experience.

Must have a special background of knowledge and understanding of related fields of work, particularly of the behavioral sciences. Must have an understanding of the theories and problems of the other disciplines on the staff, together with keeping abreast of the latest developments in the fields, especially in areas where they relate to his own work.

Incumbent has a broad knowledge of various religious faith groups, cults, and sects. He is able to correlate and coordinate the beliefs and practices held by the inmates under his charge within the needs of the orderly

running of the institution. He maintains adequate contact with community representatives of the various religious groups represented in the inmate population.